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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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Dated, New York, N. Y., November 2, 1946.

The Ogden Press, N. Y. C.

## INDEX.


| | PAGE |
|---|---|
| Petition for a Writ of Certiorari to the United States Emergency Court of Appeals | 1 |
| Opinions Below | 1 |
| Statute Involved | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement | 2 |
| Specification of Errors to Be Urged | 7 |
| Reasons for Granting Writ | 8 |
| Conclusion | 8 |
| Brief in Support of Petition of Certiorari | 9 |
| I. The Emergency Court of Appeals erred in permitting to stand a final rent director's order made without a fair hearing | 9 |
| II. The Emergency Court of Appeals erred in interpreting the Emergency Price Control Act as authorizing the Administrator to establish maximum rents which prevent the Rental Housing Industry in a Defense-Rental Area from receiving a fair return on investment for construction | 13 |
| Conclusion | 18 |
| Appendix—Pertinent Provisions of the Emergency Price Control Act of 1942 | 19 |

AUTHORITIES:

PAGE

*Cases:*

*Ambassador* v. *Bowles,* ECA 216 (1945) (not officially reported) ..... 6n, 14n

*Ambassador* v. *Porter,* ECA 308, decided Oct. 16, 1946, unreported as yet ..... 15n

*Madison Park Corp.* v. *Bowles,* 140 F. (2d) 316 (1943) ..... 17

*Morgan* v. *U. S.* (1938), 304 U. S. 1 ..... 12

*Opp Cotton Mills* v. *Administrator,* 312 U. S. 126 (1941) ..... 11

*Power Commission* v. *Hope Natural Gas Company,* 320 U. S. 591 (1944) ..... 16

*Smith* v. *Bowles,* 142 Fed. (2nd) 63 (1944) ..... 10n

*Thayer—West Point Hotel* v. *U. S.,* 64 Fed. Supp. 565 ..... 16n

*Yokus* v. *U. S.,* 321 U. S. 414 ..... 10n

*150 E. 47 St. Corp.* v. *Porter,* ECA 349 (1946)... 6n

*315 W. 97 St. Co.* v. *Porter,* 156 Fed. (2) 982, ECA 1946 ..... 13

*Statutes:*

Emergency Price Control Act of 1942 (56 Stat. 23) as amended:

Section 1(a) ..... 4, 19, 20

Section 2(b) ..... 2, 13, 20, 21

Section 204(a) ..... 3

Section 204(d) ..... 2, 21, 22

Section 205 ..... 11

Natural Gas Act (52 Stat. 821) ..... 16

PAGE

Rent Regulation for Housing in the New York City Defense-Rental Area:
Section 4(e) ..... 3
Section 5(c) (1) ..... 3
Amendment 21, 10 F. R. 14399 ..... 4n

Revised Procedural Regulation No. 3 of Office of Price Administration:
Section 1300.208-b ..... 11

*Miscellaneous:*

Chester Bowles, Price Administrator, Saturday Evening Post, September 22, 1945, p. 104..... 14n

House Committee on Banking and Currency, Hearings on H. R. 5479 (superseded by H. R. 5990), 77th Congress, 1st Session (1941), p. 11, .....16, 17

House Report No. 1409, 77th Congress, 1st Session (1941), p. 4 ..... 17

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1946.**

**No. .....**

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ANNA M. VICTOR and EDWARD H. GREEN, as Trustees under the Will of Royall Victor, Deceased,

Petitioners,

—against—

PAUL A. PORTER, Price Administrator,

Respondent.

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## Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above entitled cause on October 16, 1946.

### OPINIONS BELOW.

The opinion of the United States Emergency Court of Appeals is unreported as yet (R., Opinion on Hearing).

### STATUTE INVOLVED.

The statute involved is the Emergency Price Control Act of 1942 (56 Stat. 23), as amended, as it relates to control of rents for housing accommodations. It is hereafter referred to as the "Act".

## Jurisdiction.

The judgment of the United States Emergency Court of Appeals sought to be reviewed was entered on October 16, 1946. The jurisdiction of this Court is invoked under Section 204 (d) of the Act.

## Questions Presented.

1. Does the Emergency Price Control Act permit the Price Administrator to authorize an Area Rent Director to enter an order reducing a Landlord's rental without a fair hearing and if so, does the Act, to that extent, violate the Fifth Amendment?

2. Does the Emergency Price Control Act in authorizing the Price Administrator to establish maximum rents which "will be generally fair and equitable" and in requiring under Section 2 (b) that the Price Administrator make adjustments for increases in costs of construction, permit the Administrator arbitrarily to establish in a defense-rental area a formula which makes generally inadequate an allowance for increase in costs of construction and which does not generally permit any return on such increases in costs of construction?

## Statement.

The Respondent Price Administrator issued the "Rent Regulation for Housing in the New York City Defense-Rental Area", (hereinafter referred to as the "Rent Regulation") on October 8, 1943, to be effective November 1, 1943, and thereby established March 1, 1943 as the maximum rent date (R. Tr. 2, 3). The Petitioners are Trustees under a Will of the Estate of Royall Victor. The Estate is the owner of housing accommodations rented to tenants and located in New York City, and is therefore subject to the provisions of the Rent Regulation (R. Tr. 3).

During the months August through October 1944, the Estate spent $14,235.50 in the construction of ten (10) housing units by alteration of a private dwelling which had been unused and in a state of complete dilapidation. Having rented these apartments at a monthly rental which totalled $9,840 per annum, these individual rents became the maximum rents under Section 4 (e) of the Rent Regulation. Thereafter the New York City Area Rent Director of the Office of Price Administration gave notice that he intended to reduce the rents to a figure which would equal $6,180 per annum; and despite repeated requests for the information and data upon which he intended to do this, he subsequently reduced the rents to a total of $6,300 per annum, without giving any such information or affording any hearing. The rent reduction orders were issued March 24, 1945 (R. Tr. 5-6).

On April 12, 1945, the Petitioners filed a Protest against the Orders of the Rent Director which purported to reduce the rents on the instant housing accommodations pursuant to Sections 4 (e) and 5 (c)(1) of the Rent Regulation (R. Tr. 1). The objections set forth were in substance that the Orders were not in accordance with law; the Rent Regulation in question was invalid; no opportunity to present evidence or to inspect the records of the Area Rent Director was given; no hearing was had; no allowance for increased costs of construction over the cost of construction as of the freeze date was made; and ~~no~~ the proceeding before the Area Rent Director was violative of due process (R. Tr. 3-8, 123-124). The Protest was denied by the Price Administrator on January 29, 1946 (R. Tr. 117).

On February 27, 1946, Petitioners filed a complaint in the United States Emergency Court of Appeals under Section 204 (a) of the Act. The answer of the Price Administrator was filed on April 3rd. On October 16, 1946, the Emergency Court of Appeals filed its opinion and entered judgment dismissing the complaint. The Court held in its opinion, now sought to be reviewed, that

the statutory direction to take increased costs into account in fixing the general level of rents is not for the purpose of encouraging new construction but rather to make certain that maximum rents should be generally fair and equitable. This the Court held the Rent Regulation to be despite the fact that the allowances for increase in costs of contruction in this case was computed from March 1, 1943 (at a lesser rate); whereas in other later cases the increase was computed (at a rate 300% higher) from 1939. Also, despite its finding that the Rent Director's orders had been issued without a fair hearing, the Court held that petitioners had not been deprived of due process because almost a year later, on the Protest, the Price Administrator allowed what the Court felt to be a fair hearing and upheld the Rent Director's determination.

Petitioners have taken the position that the intention of Congress is not met by the Administrator in fixing maximum rents with an adjustment for increased costs of construction since the year 1939 only in cases of construction commenced after November 23, 1945.* They maintain that such interpretation imputes to Congress an intention to discourage new construction. Petitioners have urged that since the Administrator by public admission has indicated that the use of the 1939 date from which to calculate increased costs of construction was proper, that year as the starting point for such calculations should be applied uniformly to all cases of new construction commenced prior to November 23, 1945, as well as thereafter.

The Court below in its opinion upheld the Administrator's contention.

As we shall show in our brief, the Court below in not permitting an adjustment for increased costs of construction prior to the maximum rent date, has indicated a contrary intention to the purposes of Section 1 (a) of the Act "to assist in securing adequate production of com-

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* Amendment 21, 10 F. R. 14399, effective 11-23-45, of the Rent Regulation so provides. Prior to that time, the increased costs were calculated from March 1, 1943, by Regulation.

modities". The Court also overruled Petitioners' contention that no allowance for increased costs of construction since the "freeze date", March 1, 1943, had been granted (R. Opinion on Hearing). The record discloses that the Administrator fixed the rents at the same level as the Area Rent Director. The Administrator, however, had before him petitioners' data as to construction figures, whereas the Rent Director did not (R. Tr. 44, 126). It was, therefore, not possible to find that an allowance for increased costs of construction had been made by the Rent Director. In upholding the Administrator's result, the Court thus approved maximum rents fixed without consideration of an allowance for increased costs of construction.

Petitioners contend that the Court below, in its interpretation of the Act, has authorized the Administrator to establish maximum rents which do not permit a return to be received on increased costs of construction by the Rental Housing Industry. The formula of the Administrator, upheld by the Court below, does not allow such a return:

"(1) determine the percentage increase in general construction costs in the Area during the period from the maximum rent date to the date of completion of the work in the particular case; (2) use this percentage to arrive at the portion of the total dollar expenditures occasioned by the rise in general construction costs; (3) allocate this dollar amount to each unit; (4) return this dollar amount to the landlord by spreading it over the estimated probable life of the improvement as a whole."

Petitioners urge that this formula is not generally fair and reasonable and that it does not take into account business factors in the rental industry which must be applied if fixing of maximum rents is to be generally fair and equitable. The Court specifically ruled that no interest was allowable on that portion of the increased cost,

the recoupment of which by the Landlord is deferred over a period of useful life of the improvement: in this case, ten years (R. Opinion on Hearing). No consideration was thereby given to the factor of investment in the Rental Housing Industry as a whole. This interpretation, Petitioners hold, is unrealistic and has had the effect, as we shall show in our brief, of banning investors from making available by new construction needed housing accommodations.

Petitioners also contend that they have not received a fair hearing. The Court below has upheld this contention. That contention was sustained on the basis of the record before the Area Rent Director. As was customary in this Area,* Petitioners were not informed as to the data upon which the Area Rent Director relied as comparable in making his reduction orders (R. Tr. 11, 17, 127). However, the Court said:

> ". . . while procedural due process definitely requires that a hearing be accorded at some stage of an administrative proceeding it does not require that the hearing take place at the initial stage. . . . Accordingly if the complainants in the ensuing protest proceeding were apprised of the evidence upon which the Administrator relied and were then given a genuine hearing *de novo* the demands of due process have been met."

Petitioners contend that this interpretation of due process creates a harsh rule not required to effectuate the intent of Congress, and not consonant with the decisions of this Court.

In the light of the coincidence of a finding by the Price Administrator on Protest of rent *with allowance* for increased costs of construction *identical* with those found

* Cf. Record, *Ambassador* v. *Bowles*, ECA 216 (1945); Record, *150 E. 47 St. Corp.* v. *Porter*, ECA 349 (1946).

by the Area Rent Director *without such allowance,** the Court explained how it reached the conclusion that there had been on Protest a genuine hearing *de novo,* as required:

> ". . . We think, however, that *a much more likely explanation* is that the Board of Review and the Administrator in the light of the evidence before them in the subsequent protest proceeding determined that the rentals fixed by the area rent director adequately reflected the proper allowance for increased construction costs . . ." (Emphasis added.)

Thus the Court was forced to speculate on whether there was a genuine hearing *de novo;* and Petitioners submit that the record does not support the speculation.

Petitioners contend that due process does not hang by such a slender thread.

The questions presented in this petition raise no issue of fact; they are solely questions of law.

## Specification of Errors to Be Urged.

The Emergency Court of Appeals erred:

1. In interpreting the Emergency Price Control Act as authorizing Price Administrator to establish maximum rents which do not make adjustments for increases in costs of construction since a time when there last was general construction in the Area.

2. In interpreting the Emergency Price Control Act as authorizing the Price Administrator to establish maximum rents which do not permit a return to be received on increased costs of construction.

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* The Price Administrator thought, erroneously, that in fixing the rents originally the Rent Director had made such allowance (R. Tr. 126, 140).

3. In holding that the Emergency Price Control Act authorizes an Area Rent Director to enter an order reducing Landlord's rental without a fair hearing.

## Reasons for Granting Writ.

The Court below has decided important questions of federal law which have not been, but should be, settled by this Court. This case is one of general and far-reaching significance. Its determination will govern the administration of the Emergency Price Control Act in the New York City Defense-Rental Area where landlords are neither permitted an adjustment for increases in costs of construction on construction commenced prior to November 23, 1945 except from the maximum rent date; nor permitted a return on increased costs of construction; nor customarily permitted a fair hearing before the Area Rent Director prior to the issuance of rent reduction orders.

Petitioners contend that this judgment sanctions a regulation and procedure which has had the effect of destroying all incentive on the part of Landlords to produce and improve a vast number of housing accommodations in the New York City Defense-Rental Area which might otherwise be available to ameliorate the acute housing shortage.

## Conclusion.

Because of the importance of the federal questions presented, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY N. RAPAPORT,
*Counsel for Petitioners.*

Salvatore M. Pino, Jr.,
*Of Counsel.*

November 8, 1946.

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1946.**

**No. .....**

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ANNA M. VICTOR and EDWARD H. GREEN, as Trustees under the Will of Royall Victor, Deceased,

*Petitioners,*

—against—

PAUL A. PORTER, Price Administrator,

*Respondent.*

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## BRIEF IN SUPPORT OF PETITION OF CERTIORARI.

References to the opinions of the Court below and the grounds of jurisdiction as well as a statement of the case and specification of errors to be urged are contained in the petition and will not here be repeated.

### I.

**The Emergency Court of Appeals erred in permitting to stand a final rent director's order made without a fair hearing.**

The opinion below states:

". . . We think that the record sustains the complainants' contention that they did not receive a fair hearing in the proceedings before the area rent director. Compare *Int. Com. Comm.* v. *Louis & Nash R. R.*, 227 U. S. 88 (1913) . . .

> . . . It does not necessarily follow, however, that the complainants have been deprived of due process of law. As we recently had occasion to point out . . . while procedural due process definitely requires that a hearing be accorded at some stage of an administrative proceeding it does not require that the hearing take place at the initial stage. See *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152-153 (1941)."

The Court then went on to say that if, subsequently, the Administrator apprised the complainants of the evidence in the protest proceeding and gave them a genuine hearing *de novo*, the demands of due process were met. There was in fact no such hearing because there was no opportunity to check the evidence used by the Price Administrator (R. Tr. 65-67).* Moreover, in the instant case the record clearly demonstrates that the Rent Director could have made no allowance for increased costs of construction because he did not have the information upon which to make such allowance (R. Tr. 140); although the Chief Rent Examiner in the Rent Director's Office assumed that the allowance had been made and so did the Administrator (R. Tr. 44, 126). The Administrator denied any relief under the Protest; and came to the conclusion that the drastic reductions in the rents fixed by the Rent Director were proper. Thus the Court was faced with the problem of an apparent coincidence: that the rents should come to an identical amount both with the allowance for increased costs of construction and without. This problem the Emergency Court of Appeals resolved with the statement that it did not indicate that there was no genuine hearing *de novo* (which was required in any event**), but that "a much more likely explanation" was that they reached the identical figures independently.

The end result creates a harsh rule which is neither required in practice nor necessary to effectuate the intent

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* Cf. *Yakus* v. *U. S.*, 321 U. S. 414 at 434, 435.

** *Smith* v. *Bowles*, 142 Fed. (2nd) 63 (1944).

of Congress. It was alleged below,* and the Court did not hold otherwise, that in the New York City Defense-Rental Area it was customary for the Rent Director to deny information to landlords and therefore the granting of a fair hearing was not the customary procedure. The Court's decision means that in order to get due process—even to know whether a landlord has been treated fairly—in the New York Area a landlord must incur the very substantial expense of filing a protest. Such expense is prohibitive in most cases. And now it appears that the possibility of successfully prosecuting such a protest can be defeated by a finding so uncertain on the facts that the Court can do no more than speculate as to the manner in which it was reached. Such a determination effectually precludes a showing of error wherever a fact question is involved. It violates the spirit and essence of due process.

This Court has not held otherwise. In the *Opp* case (*supra*) to which the Court below alluded for support, there was no order issued by the Wage and Hour Administrator until after the due process had taken place. In the instant case the final order was in effect from the day the Rent Director issued it, under Section 1300.208-b of Revised Procedural Regulation No. 3 of the Office of Price Administration. From that day forth the Landlord was subject to criminal and civil penalties and to injunction proceedings under Section 205 of the Emergency Price Control Act. The Rent Director's order was denominated "final" by the Price Administrator in his Procedural Regulation; and it is in practical effect a final order, even though it may later be corrected or changed. It loses none of its finality, any more than a judgment of a court of first jurisdiction, even though that judgment may, on appeal, be modified or reversed.

When a government agency adopts a procedure which does not constitute the granting of a fair hearing at the

* Complaint ¶8(d); Complainants' Brief, p. 15.

Rent Director level in the largest Defense-Rental Area in the country, then to make the only sanction for such violation the opportunity for the expenditure by the citizen of large sums and effort in an attempt to secure relief, would seem to be contrary to what this Court held in *Morgan* v. *U. S.* (1938), 304 U. S. 1, 14 and 15, in which Chief Justice Hughes stated:

> "On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute and (2) that the order was arbitrary and unsupported by substantial evidence.
>
> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible in our system by adherence to basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a fair and open hearing,—essential alike to the legal validity of the administrative regulation and to the maintenance of the public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'."

## II.

**The Emergency Court of Appeals erred in interpreting the Emergency Price Control Act as authorizing the Administrator to establish maximum rents which prevent the Rental Housing Industry in a Defense-Rental Area from receiving a fair return on investment for construction.**

As to maximum rents fixed on properties constructed after the maximum rent date, Section 2 (b) of the Act requires that increased costs be taken into account. The Price Administrator has recognized this by a Regulation which directs that in fixing such rents due consideration shall be given to increased costs of construction since the maximum rent date. The factual situation in the New York City Area differs sharply from that in other areas rent-control-wise. In other areas throughout the country, right up to the time of the maximum rent dates, there was construction because the rentals obtainable warranted such construction. In New York City there was no construction at the maximum rent date March 1, 1943, or for years prior thereto. These are reflected in the statistics compiled by the Price Administrator which show very substantial increases in net operating income under rent control generally in rental areas throughout the country;* as contrasted with the picture in New York City, where net operating income since rent control has been barely able to reach the standards which obtained in 1939 (R. Tr. 69, 77, 111, 113; Cf. *315 W. 97 St. Co.* v. *Porter*, 156 Fed. (2) 982, ECA 1946, petition pending in this Court for certiorari).

The Price Administrator, ignoring these differences, made the provision uniform that the allowance for increased costs of construction should be based on increases

* Price Administrator's Report of Operations under Rent Control in 36 cities, exclusive of New York, January, 1946.

accruing since the maximum rent date. It was realistic enough generally in other rental areas: it was utterly unrealistic in New York City. But until it was applied, it could not be known what its effect would be. The formula was kept a secret by the Administrator for a year and a half until brought out in a proceeding brought in the Emergency Court of Appeals.*

When the time came that the Administrator really wanted to induce construction, he amended the Regulation so as to provide that increased costs of construction should be computed from 1939, the last date when construction in volume had taken place (R. Tr. 119).

We do not here press the point that Congress intended to encourage the creation of additional housing units during the active phase of the war.** It is sufficient for our purpose to urge that Congress intended that the allowance should be fair and reasonable, and not constitute an entrapment for those unwary enough to build. The Price Administrator went to pains to publicize that the allowance formula was "adequate".*** Its adequacy can be gauged by the allowance of 50¢ per room per month

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* *Ambassador* v. *Bowles*, ECA 216 (1945), not officially reported.

** In his Brief below, pp. 26, 27, the Price Administrator argued:

> ". . . there is no statutory requirement that such increases be reflected in maximum rents established by the Administrator. However, in order to encourage construction, the Administrator—pursuant to the authority contained in Section 2 (c) of the statute—determined that a monetary incentive beyond 'comparability' should be added and provided to those individual landlords desirous of engaging in remodelling, reconversion and reconstruction . . .
>
> For construction not accomplished under priorities—a relatively minor amount of total war-time construction (Tr. 74)—the incentive took the form of an added amount measured by the general increases in costs of construction in the Area since March 1, 1943. It was in the light of this provision that the alterations in issue took place."

*** Chester Bowles, Price Administrator, Saturday Evening Post, September 22, 1945, p. 104.

(about $1.00 per apartment) in the instant case on a new investment of $14,235 (R. Tr. 62); and 76¢ per apartment per month on an investment of approximately $10,000 in another similar case.*

The Emergency Court of Appeals went further. It appeared that the Administrator formulated his allowance as follows:

> "(1) determine the percentage increase in general construction costs in the Area during the period from the maximum rent date to the date of completion of the work in the particular case; (2) use this percentage to arrive at the portion of the total dollar expenditures occasioned by the rise in general construction costs; (3) allocate this dollar amount to each unit; (4) return this dollar amount to the landlord by spreading it over the estimated probable life of the improvement as a whole."

The Court held that the Administrator did not need to give effect to the competitive life of the improvement but could determine the allowance by the probable physical life of the improvement. The Court held further in ruling upon the landlord's right to an allowance for interest on the increased cost of construction, for the return of which they were required to wait 10 years, that the Act does not require the fixing of maximum rents at a level which will assure to landlords a fixed or definite rate of return, but only on a level which will be generally fair and equitable to the Rental Housing Industry as a whole. We suggest that to require a builder to wait 10 years for the return of the increased costs of construction when there is no assurance that competitive conditions after a few years will permit of such reimbursement in practice, and to require him to wait without receiving any return at all on such increased cost is not generally fair and equi-

* *Ambassador* v. *Porter*, ECA 308, decided Oct. 16, 1946, unreported as yet.

table;* and that the only result can be to stifle building operations. That indeed has been the effect of its ruling in New York City (R. Tr. 69, 70, 111).

This Court has held that the use by Congress of the phrase "just and reasonable" in a regulatory statute (which phrase, we submit, is equivalent in meaning to "fair and equitable" in the Act here in question) implies a requirement that the rate will permit a fair return, even where the statute, like this one, does not "in terms" so require. In *Power Commission* v. *Hope Natural Gas Company,* 320 U. S. 591 (1944), involving the federal Natural Gas Act (52 Stat. 821), this Court said (p. 603):

> "By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. *That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.*" (Emphasis supplied.)

The legislative history of the Act indicates that Congress intended that the phrase "generally fair and equitable", also implied a fair return.

In preparing the price control bill Congress relied heavily upon the proposals of Leon Henderson, then Administrator of the Office of Price Administration and Civilian Supply, later the Price Administrator. Mr. Henderson in testifying before the House Committee stressed the necessity of permitting industries to earn a return sufficient to "sustain the industries concerned in a high state of efficiency, provide a living for those who conduct them, enable them to pay good wages, and make possible the expansion of their enterprises . . ." (House Committee on Banking and Currency, Hearings on H. R. 5479

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* Cf. *Thayer—West Point Hotel* v. *U. S.*, 64 Fed. Supp. 565, 569.

(superseded by H. R. 5990), 77th Congress, 1st Session (1941), p. 11). This language was subsequently adopted by members of the Committee and was reiterated by Mr. Henderson (Hearings, *supra,* pp. 825, 103, 890). It seems clear too that the standards for fixing prices were also intended to apply to rents (House Report No. 1409, 77th Congress, 1st Session (1941), p. 4). During the legislative hearings Congress discussed the problem of permitting a fair return to each individual landlord as opposed to the industry in general and concluded that to provide a fair return to each individual landlord would be administratively impractical (Hearings on H. R. 5479 (superseded by H. R. 5990), *supra,* pp. 455, 962, 964). But throughout the legislative hearings on the Act and in opinions of the Emergency Court of Appeals it was taken for granted that the statutory standard requires that industry as a whole be permitted to earn a fair return on investment.

In *Madison Park Corp.* v. *Bowles,* 140 F. (2d) 316, 323-324 (1943), the Emergency Court of Appeals itself supported this view, saying:

> "In the legislative history of the Act there is further guidance as to the meaning of the words 'generally fair and equitable'. From discussions of the legislation before its enactment, it appears the intention was to permit business a *yield or profit sufficient for its sustenance in a state of efficiency and for reasonable development and expansion.*" (Emphasis supplied.)

When the sum total is taken of the Price Administrator's action: To compute the allowance for increased costs of construction from a time when there was no construction, rather than from the time when there last was construction; and to require a builder to wait 10 years, without interest, for the return of the differential in costs of construction, it becomes clear that the Regulation and the

formula were not in accord with the Act of Congress and were arbitrary and unfair. When to this is added the customary practice of requiring prohibitive expense and a long period of delay after final order to secure due process, it also becomes clear why there is no alteration construction in an area where thousands of housing units stand idle for want of such rehabilitation.

## CONCLUSION.

**The petition for a writ of certiorari should be granted.**

Respectfully submitted,

HENRY N. RAPAPORT,
*Counsel for Petitioners.*

SALVATORE M. PINO, JR.,
*Of Counsel.*

Dated, New York, N. Y., November 8, 1946.

## APPENDIX.

### Pertinent Provisions of the Emergency Price Control Act of 1942.

Section 1 (a). It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to

work toward a stabilization of prices, fair and equitable wages, and cost of production.

Section 2 (b). Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs within such defense-rental area. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such

extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area. Whenever the Administrator shall find that, in any defense-rental area or any portion thereof specified by him, the availability of adequate rental housing accommodations and other relevant factors are such as to make rent control unnecessary for the purpose of eliminating speculative, unwarranted, and abnormal increases in rents and of preventing profiteering, and speculative and other disruptive practices resulting from abnormal market conditions caused by congestion, the controls imposed upon rents by authority of this Act in such defense-rental area or portion thereof shall be forthwith abolished; but whenever in the judgment of the Administrator it is necessary or proper, in order to effectuate the purposes of this Act, to reestablish the regulation of rents in any such defense-rental area or portion thereof, he may forthwith by regulation or order reestablish maximum rents for housing accommodations therein in accordance with the standards set forth in this Act. (As amended June 30, 1944).

Section 204 (d). Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued

under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute and regulations involved | 2 |
| Statement | 3 |
| Argument | 6 |
| Conclusion | 11 |
| Appendix | 12 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Adams* v. *Milwaukee*, 228 U. S. 572 | 9 |
| *Ambassador Apartments, Inc.* v. *Porter*, (E. C. A. No. 310, decided October 16, 1946) | 8 |
| *Bowles* v. *Willingham et al.*, 321 U. S. 503 | 9, 10 |
| *Direct Realty Co.* v. *Porter*, 157 F. 2d 434 | 8 |
| *Ladner* v. *Bowles*, 142 F. 2d 566 | 7 |
| *Lawton* v. *Steele*, 152 U. S. 133 | 9 |
| *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 | 9 |
| *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589 | 9 |
| *Springer* v. *United States*, 102 U. S. 586 | 9 |
| *Wilson* v. *Brown*, 137 F. 2d 348 | 10 |
| *Yakus* v. *United States*, 321 U. S. 414 | 9 |
| Constitution and statute: | |
| Fifth Amendment | 8 |
| Emergency Price Control Act of 1942, 56 Stat. 23, as amended (50 U. S. C. App., Supp. V, 901 *et seq.*): | |
| Section 2 (b) | 12 |
| Section 203 | 4, 9, 13 |
| Regulations: | |
| Rent Regulation for Housing in the New York City Defense-Rental Area, 8 F. R. 13914: | |
| Section 4 (a) | 3, 15 |
| Section 4 (e) | 3, 15 |
| Section 5 | 4, 15 |
| Section 5 (c) (1) | 3, 16 |
| Revised Procedural Regulation No. 3, 8 F. R. 526 | 4, 16 |
| Miscellaneous: | |
| III Op. & Dec. (OPA 1945) 3341 | 8 |
| IV Op. & Dec. (OPA 1946) 3079, 3083–3084, 3153 | 8 |

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 694

ANNA M. VICTOR AND EDWARD H. GREEN, AS TRUSTEE UNDER THE WILL OF ROYALL VICTOR, DECEASED, PETITIONERS

*v.*

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 154–159) has not yet been reported.

### JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on October 16, 1946 (R. as certified, 208). The petition for a writ of certiorari was filed in this Court on November 13, 1946. The jurisdiction of this

Court is invoked under Section 204 (d) of the Emergency Price Control Act (50 U. S. C. App., Supp. V, Section 924 (d)) making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

## QUESTIONS PRESENTED

1. Were the petitioners deprived of their property without due process of law in violation of the Fifth Amendment by the failure of the Rent Director for the New York City Defense-Rental Area to afford them a fair hearing before he issued orders reducing the maximum rents on their remodelled housing accommodations, where the petitioners were subsequently given a fair hearing by the Price Administrator on a protest filed by them to such orders?

2. Does Section 2 (b) of the Emergency Price Control Act require that the Administrator, in adjusting the maximum rent for particular housing accommodations after they have been remodelled, fix the maximum rent at a level which will assure to the individual landlord a fair return on that part of his investment represented by the increases in the costs of remodelling over similar costs prevailing on March 1, 1943?

## STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (herein sometimes termed "the Act"), the Rent Regula-

tion for Housing for the New York City Defense-Rental Area (herein sometimes termed "the Rent Regulation"), and Revised Procedural Regulation No. 3, are set forth in the Appendix, *infra*, pp. 12–18.

## STATEMENT

The Rent Regulation for Housing in the New York City Defense-Rental Area establishes as the maximum rents for housing accommodations rented on March 1, 1943 the rents in effect on that date (Section 4 (a), *infra*, p. 15). For accommodations first rented after that date, the first rent charged by the landlord himself becomes the maximum rent (Section 4 (e), *infra* p. 15). To prevent excessive maximum rents from being charged for accommodations first rented after March 1, 1943, and to put the owner of such accommodations in substantially the same position as owners of accommodations already rented on that date, the Rent Regulation authorizes the reduction of such a rent to the level of the rent which prevailed generally for comparable accommodations in the Area on the maximum rent date (Section 5 (c) (1), *infra*, p. 16). For housing accommodations which were remodelled after the maximum rent date, as in this case, the Rent Regulation further provides that there shall be added to the maximum rent otherwise fixed an amount which makes appropriate allowance for general increases in construction costs which occurred during the period from the maximum rent date to the date of

completion of the remodelled accommodations (Section 5, *infra*, pp. 15–16). The changes in the maximum rents are effected through proceedings before Rent Directors, who are in charge of the local area rent offices, and whose determinations may be protested in accordance with the provisions of Revised Procedural Regulation No. 3, *infra*, pp. 16–18, and Section 203 of the Act, *infra*, pp. 13–14.

Petitioners are the owners of a remodelled structure, situated at 345 West 87th Street, New York City, which contains ten apartments (R. 3–4, 46–61).[1] The structure was originally a private dwelling and was converted to apartment units during August–October 1944. The apartments were thereafter rented at rentals ranging from

[1] At petitioners' request and by stipulation of the parties, which petitioners have not included in the Record, certain portions of the certified Record were not printed. The Record, as printed, consists of two volumes, one containing only the transcript of proceedings before the Price Administrator and the opinion of the court below, and the other additional evidence presented directly to the court below. The first volume has only the original pagination, and the other no pagination whatsoever. Except where otherwise indicated, the Record references herein are not to the certified Record on file with the Clerk of this Court. References to the first volume of the printed Record containing the transcript of the proceedings before the Price Administrator will be designated as "R" followed by the appropriate original page number. References to the second volume containing the additional evidence will be designated "A. E." followed by the appropriate page number had the pages of that volume been numbered *seriatim* beginning with number 1.

$65 to $100 per month (R. 4, 128–131). These rents, which, under Section 4 (e) of the Rent Regulation, became the maximum rents, were found to be in excess of the rents generally prevailing in the Area for comparable accommodations on March 1, 1943, and were consequently reduced by orders of the Rent Director to amounts ranging from $45 to $70 per month. Before this action was taken petitioners were notified that it was contemplated, and they were given an opportunity to file objections. (R. 132–139, 148–152.)

Petitioners then filed a protest with the Price Administrator against the orders of the Rent Director (R. 1–9). During the protest proceeding, evidence was introduced bearing upon the rentals generally prevailing for comparable accommodations in the Area on March 1, 1943, and upon general increases in costs of construction in the Area after that date (R. 39–63, 78–98). Copies of this evidence were served upon petitioners who were provided an opportunity to present rebuttal and other relevant evidence, and of which petitioners availed themselves (R. 24–34, 64–70, 72–77, 99–113). Thereafter, the Administrator issued an order denying the protest together with an opinion stating the reasons for denial (R. 117–127).

Petitioners thereupon filed a complaint in the United States Emergency Court of Appeals in which they contended that: (1) The maximum rents established for their accommodations were

invalid for lack of a fair hearing in the proceedings before the Rent Director (R. as certified, 154–161); (2) the Rent Regulation was invalid because it provided for making allowance only for expenditures occasioned by increases in costs of construction from March 1, 1943, rather than from 1941; and (3) the Rent Regulation was not in conformity with Section 2 (b) of the Act because it did not allow petitioners a "fair return" on that portion of their investment which represented expenditures occasioned by increases in construction costs. The court below dismissed the complaint, holding (1) that the failure of the Rent Director to afford the petitioners a fair hearing did not prejudice them in their procedural rights, since they later received a fair hearing in the protest proceedings, (2) that the Administrator had not used an improper date as a basis for determining increases in construction costs, and (3) that the Act did not require the Administrator, in making allowance for increased costs of construction, to assure each landlord a fair return on that portion of his investment which represented expenditures occasioned by such increased costs.

ARGUMENT

1. Petitioners urge that the court below erred in holding that their procedural rights under the Fifth Amendment were not violated in this case by the failure of the Rent Director to afford

them a fair hearing before he issued the orders which reduced the maximum rents on their apartments. It is clear that the failure of the Rent Director to afford the petitioners a fair hearing before issuing the maximum rent orders in this case did not prejudice them in either their procedural or substantive rights. In the subsequent protest proceedings the petitioners were given a fair hearing,[2] during the course of which there was introduced and served upon the petitioners

[2] The petition contains intimations that the hearing afforded to the petitioners in the protest proceeding was not fair on the alleged ground that the protest did not receive the *de novo* consideration of the Price Administrator. See *Ladner* v. *Bowles*, 142 F. 2d 566 (E. C. A.). In the court below petitioners urged this point strenuously, alleging that the Price Administrator approved rentals identical in amount to those established initially by the Rent Director despite the fact that the Rent Director did not make allowances for increased construction costs. To support that allegation, petitioners relied upon the additional evidence consisting of confidential reports (A. E. 3–25), which were reproduced and presented to the court below by respondent at the petitioners' request. Although the rejection of the foregoing contention by the court below is not advanced as an independent ground for granting certiorari, it may be noted that (1) the Rent Examiner's Reports (A. E. 7, 9, 11, 12, 15, 17, 19, 21, 23, 25) disclose that the maximum rents recommended by him and followed by the Rent Director show attention to the matter of construction cost increases; and (2) the maximum rents recommended to the Examiner and Rent Director by the Rent Inspector were stated in terms of a range rather than a specific maximum rent thereby leaving ample margin for the Price Admin-

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the substance of the very evidence with which they claimed the Rent Director should have provided them if the hearing before the Rent Director was to be deemed fair. After such fair hearing the Price Administrator determined *de novo*[3] that the maximum rents should be established at the levels fixed by the Rent Director. This determination of the Administrator was reviewed by the court below and upheld. Consequently, the failure of the Rent Director in the first instance to give petitioners a fair hearing was corrected (assuming *arguendo* that they had a right to such a hearing), and that failure could not, therefore, adversely or illegally affect any of their rights which are protected by the Fifth Amendment.

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istrator to approve maximum rents identical to those established by the Rent Director but nevertheless including proper allowance for construction cost increases (A. E., bottom of pages 6, 8, 10, 13, 14, 16, 18, 20, 22, 24). This is attested to in the formal affidavit of the Inspector (R. 45–63).

[3] It should be observed that in accordance with the established administrative practice the Administrator, had he finally determined in the protest proceedings that higher maximum rents were warranted, would have revoked the orders of the Rent Director and made the higher rents effective as of the date of the Director's orders (R. 35–38, 157–158). III Op. & Dec. (OPA 1945) 3341; IV Op. & Dec. (OPA 1946) 3079, 3083–3084, 3153. This practice was approved in *Ambassador Apartments, Inc.* v. *Porter*, Emergency Court of Appeals, No. 310, decided October 16, 1946 (Not yet reported). See also *Direct Realty Co.* v. *Porter*, 157 F. 2d 434, 440 (E. C. A.).

Furthermore, it is well settled that the Fifth Amendment does not require a hearing before administrative action is taken, so long as adequate opportunity is subsequently afforded persons subject to such action to secure review thereof. *Bowles* v. *Willingham et al.*, 321 U. S. 503; *Yakus* v. *United States*, 321 U. S. 414; *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589; *Adams* v. *Milwaukee*, 228 U. S. 572; *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306; *Lawton* v. *Steele*, 152 U. S. 133; *Springer* v. *United States*, 102 U. S. 586. In *Bowles* v. *Willingham, supra,* in which an individual landlord sought to enjoin the issuance of an order of a Rent Director reducing a maximum rent found to be excessive, as in this case, this Court held that the judicial review provisions of the Act satisfied the requirements of the Fifth Amendment. Petitioners in this case not only obtained such judicial review, but, in accordance with the provisions of Section 203 of the Act, also obtained administrative review of the Rent Director's orders and a *de novo* determination by the Price Administrator.[4]

[4] It is clear, of course, that the Act neither requires nor contemplates that there be a hearing before regulations or orders under the Act are issued. *Bowles* v. *Willingham et al., supra.* Instead the protest procedure was provided to afford administrative review after the issuance of such regulations and orders.

2. Petitioners also urge that the Emergency Court of Appeals erred in holding that Section 2 (b) of the Act does not require that a maximum rent fixed for particular accommodations, remodelled after the maximum rent date, assure the individual landlord a fair return on that portion of his investment representing expenditures occasioned by increases in costs of construction.[5]

The question thus presented by petitioners has already been decided by this Court. In *Bowles* v. *Willingham et al., supra,* this Court, citing with approval the decision of the Emergency Court of Appeals in *Wilson* v. *Brown,* 137 F. 2d 348, ruled that the Act does not require the Administrator to fix maximum rents which will assure each individual landlord a fair return on his total investment. It follows, *a fortiori,* that the Act does not require the Administrator to assure an individual landlord a fair return upon the particular portion of his investment represented by expenditures occasioned by the increased costs of construction.

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[5] Petitioners also urge that the Emergency Court of Appeals erred in holding that Section 2 (b) does not require that the increases in costs of construction to be allowed for, be measured from 1941—the time when petitioners allege "there last was general construction in the Area" (Pet. 7)—rather than from March 1, 1943, the maximum rent date. As pointed out by the Court below (R. 155, 156) this contention is based upon a misconception of the statutory purposes and is contrary to the language of Section 2 (b).

## CONCLUSION

The decision of the court below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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DECEMBER 1946.

# APPENDIX

I. The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23), as amended by the Stabilization Extension Act of 1944[1] (58 Stat. 632) (50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

> SEC. 2. (b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area

[1] Roman type is used to indicate text which has not been changed since original enactment or issuance and italics are used to indicate amendments.

housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs *within such defense-rental area.*[2]

SEC. 203. (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[3] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in sup-

[2] Added by sec. 102 of the Stabilization Extension Act of 1944.

[3] As amended by sec. 106 of the Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

port of such objections.[4] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[5] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

II. Pertinent provisions of the Rent Regulation for Housing for New York City Defense-Rental Area (8 F. R. 13914) as amended:

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[4] As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[5] As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

SEC. 4. *Maximum rents.* Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented on March 1, 1943.* For housing accommodations rented on March 1, 1943, the rent for such accommodations on March 1, 1943.

* * * * *

(e) *First rent after November 1, 1943.* For (1) newly constructed housing accommodations without priority rating first rented on or after November 1, 1943, or (2) housing accommodations changed on or after November 1, 1943 so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time between December 31, 1942 and November 1, 1943, or (4) housing accommodations changed on or after November 1, 1943 from unfurnished to fully furnished, the first rent for such accommodations after the change or on or after November 1, 1943, as the case may be. Within 30 days after so renting the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

SEC. 5. *Adjustments and other determinations.* In the circumstances enumerated in this section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. * * *

In * * * cases [involving reductions under paragraph c (1)] * * * the adjustment shall be on the basis of the rent which the Administrator finds was generally prevailing in the defense-rental area for

comparable housing accommodations on March 1, 1943.

In cases involving construction, due consideration shall be given to general increases in costs of construction, if any, in the defense-rental area since March 1, 1943.[6]

* * * * *

(c) *Grounds for decrease of maximum rent.* The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(1) *Rent higher than rents generally prevailing.* The maximum rent for housing accommodations under paragraph (c), (d), (e), or (g) of section 4 is higher than the rent generally prevailing in the defense-rental area for comparable housing accommodations on March 1, 1943.

III. Pertinent provisions of Revised Procedural Regulation No. 3 (8 F. R. 526) (Procedure for adjustments, amendments, protests, and interpretations under rent regulations):

SUBPART A—LANDLORDS' PETITIONS AND TENANTS' APPLICATIONS

§ 1300.207 *Action by rent director on his own initiative.* In any case where the

[6] This paragraph was in force at time of remodeling of petitioners' units (August–October, 1944). By Amendments 21 and 27, issued on November 23, 1945 and May 27, 1946, respectively, this paragraph was changed to read: "In cases involving construction, appropriate allowance shall be made for general increases in costs of construction in the defense-rental area since 1939, except that in the case of construction initiated prior to November 23, 1945, such allowance shall reflect general increases in costs of construction in the defense-rental area since March 1, 1943."

rent director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter an order on his own initiative, he shall, before taking such action, serve a notice upon the landlord of the housing accommodations involved stating the proposed action and the grounds therefor. The proceeding shall be deemed commenced on the date of issuance of such notice.

§ 1300.208 *Action by the rent director on petitions for adjustment or other relief.*

* * * * *

(b) An order entered by a rent director upon a petition for adjustment or other relief, or an order entered by a rent director on his own initiative, shall be effective and binding until changed by further order and shall be final subject only to application for review or protest as provided in §§ 1300.209 and 1300.210 and §§ 1300.216 to 1300.242, inclusive, of this regulation. An order entered by a rent director may be revoked or modified at any time upon due notice to the petitioner.

* * * * *

SUBPART C—PROTESTS

*General Provisions*

§ 1300.216 *Right to protest.* Any landlord subject to any provision of a maximum rent regulation, or of an order issued under § 1300.210 of this regulation, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under § 1300.207 of this regulation, may file a protest in the manner set forth below.

* * * * *

§ 1300.224 *Action by the Administrator on protest.* (a) Within a reasonable time

after the filing of any protest in accordance with this revised procedural regulation, but in no event more than thirty days after such filing, the Administrator shall:

(1) Grant or deny such protest in whole or in part;

(2) Notice such protest for hearing of oral testimony in accordance with §§ 1300.228 or 1300.232 of this revised procedural regulation;

(3) Notice such protest for hearing of oral argument by a board of review in accordance with § 1300.236;

(4) Provide an opportunity to present further evidence in connection with such protest. Within a reasonable time after the presentation of such further evidence, the Administrator may notice such protest for hearing of oral testimony in accordance with subparagraph (2) of this section, notice the protest for hearing of oral argument by a board of review in accordance with subparagraph (3) of this section, include additional material in the record of the proceedings on the protest in accordance with §§ 1300.230 and 1300.231 of this revised procedural regulation, or take such other action as may be appropriate to the disposition of the protest.

(b) Notice of any such action taken by the Administrator shall promptly be served upon the protestant.

(c) Where the Administrator has ordered a hearing on a protest or has provided an opportunity for the presentation of further evidence in connection therewith, he shall, within a reasonable time after the completion of such hearing or the presentation of such evidence, grant or deny such protest in whole or in part.

U. S. GOVERNMENT PRINTING OFFICE: 1948